

CIVIL COVER SHEET

The JS-44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

I. (a) PLAINTIFFS *See Attachment*

DEFENDANTS *See Attachment*

Dallas

304 77 2169 R

(b) County of Residence of First Listed Plaintiff
(EXCEPT IN U.S. PLAINTIFF CASES)

County of Residence of First Listed
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE LAND INVOLVED.

(c) Attorney's (Firm Name, Address, and Telephone Number)

Attorneys (If Known)

See Attachment

RECEIVED

001 - 6 2004

CLERK, U.S. DISTRICT COURT
DISTRICT OF TEXAS

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff
- ☒ 2 U.S. Government Defendant
- ☐ 3 Federal Question (U.S. Government Not a Party)
- ☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- Citizen of This State ☐ 1 ☐ 1
- Citizen of Another State ☐ 2 ☐ 2
- Citizen or Subject of a Foreign Country ☐ 3 ☐ 3
- Incorporated or Principal Place of Business In This State ☐ 4 ☐ 4
- Incorporated and Principal Place of Business In Another State ☐ 5 ☐ 5
- Foreign Nation ☐ 6 ☐ 6

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury	<input type="checkbox"/> 362 Personal Injury—Med. Malpractice <input type="checkbox"/> 365 Personal Injury—Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability <input type="checkbox"/> 555 Prison Condition	<input type="checkbox"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 R.R. & Truck <input type="checkbox"/> 650 Airline Regs. <input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 690 Other	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark
REAL PROPERTY <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	CIVIL RIGHTS <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 440 Other Civil Rights	PRISONER PETITIONS <input type="checkbox"/> 510 Motions to Vacate Sentence <input type="checkbox"/> 530 General Habeas Corpus <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition	LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act	<input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 892 Economic Stabilization Act <input checked="" type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes <input type="checkbox"/> 890 Other Statutory Actions
			SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g))	FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609

V. ORIGIN (PLACE AN "X" IN ONE BOX ONLY)

- ☒ 1 Original Proceeding
- ☐ 2 Removed from State Court
- ☐ 3 Remanded from Appellate Court
- ☐ 4 Reinstated or Reopened
- ☐ 5 Transferred from another district (specify)
- ☐ 6 Multidistrict Litigation
- ☐ 7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION (Cite the U.S. Civil Statute under which you are filing and write brief statement of cause. Do not cite jurisdictional statutes unless diversity.)

42 U.S.C. sec. 7604 - Action to compel performance of non-discretionary duties under Clean Air Act for the Dallas Fort Worth area to: 1) determine attainment status; and 2) act on submitted state implementation plan.

VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A CLASS ACTION DEMAND UNDER F.R.C.P. 23

CHECK YES only if demanded in complaint:

JURY DEMAND: ☐ Yes ☒ No

VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE

DOCKET NUMBER

DATE *October 1, 2004*

SIGNATURE OF ATTORNEY OF RECORD

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG JUDGE _____

ATTACHMENT TO CIVIL COVER SHEET
BLUE SKIES ALLIANCE, ET AL, V. LEAVITT, ET AL.

I.(a) PARTIES

Plaintiffs:

BLUE SKIES ALLIANCE

DOWNWINDERS AT RISK

PUBLIC CITIZEN

SIERRA CLUB

Defendants:

LEAVITT, MICHAEL O., Administrator, US Environmental Protection Agency

GREENE, RICHARD E., Regional Administrator, US Environmental Protection Agency,
Region XI

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

I.(c) ATTORNEYS

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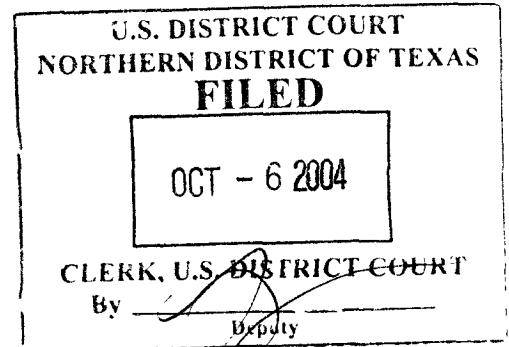
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PUBLIC CITIZEN, and SIERRA CLUB



30401 2168R

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

BLUE SKIES ALLIANCE, DOWNWINDERS AT
RISK, PUBLIC CITIZEN and SIERRA CLUB, non-
profit corporations,

Plaintiffs,

vs.

MICHAEL O. LEAVITT, Administrator, US
Environmental Protection Agency; RICHARD E.
GREENE, Regional Administrator, US
Environmental Protection Agency, Region VI, and
the UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY,

Defendants.

Civil Action No.

COMPLAINT

JURISDICTION AND VENUE

1
2 1. This Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331
3 (federal question), 1361 (mandamus), 2201 (declaratory relief), 2202 (other relief) and 42
4 U.S.C. § 7604(a)(2) (action arising under the Clean Air Act).

5
6 2. On December 17, 2003, Plaintiffs BLUE SKIES ALLIANCE,
7 DOWNWINDERS AT RISK, PUBLIC CITIZEN and SIERRA CLUB served by certified mail
8 Defendants MICHAEL LEAVITT, RICHARD GREENE and THE U.S. ENVIRONMENTAL
9 PROTECTION AGENCY (EPA) with notice of the matters complained of herein and their
10 intent to file suit thereon in the form and manner required pursuant to 42 U.S.C. § 7604(b).
11 More than sixty days have elapsed since notice was served and the violations complained of are
12 continuing.

VENUE

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14
15 3. Venue lies in the Northern District of Texas pursuant to 28 U.S.C. § 1391(e)
16 since Plaintiffs each represent members that reside in the Dallas-Fort Worth (DFW)
17 metropolitan area and since Defendant EPA's regional office is located in Dallas in the state of
18 Texas.

NATURE OF ACTION

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21 4. This is an action brought under the "Citizens' Suit" provisions of the Clean Air
22 Act (CAA or Act) to compel the Administrator of the United States Environmental Protection
23 Agency (Administrator) to take several non-discretionary actions mandated by the Act.
24 Plaintiffs first seek to compel the Administrator to make a determination whether the DFW
25 nonattainment area failed to achieve the one hour national ambient air quality standard for
26 ozone by DFW's statutory attainment date of November 15, 1999. The Clean Air Act requires
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28

1 the Administrator to make his finding whether an area has met an attainment date no later than
2 six (6) months after that deadline, or for the DFW area, by May 15, 2000. 42 U.S.C. § 7509(c).
3 The state of Texas has supplied EPA with ambient air quality data establishing that the DFW
4 nonattainment area did not attain the one hour ozone standard by the deadline, and thus EPA
5 has a non-discretionary duty to promptly make a finding that the DFW nonattainment area
6 failed to attain the 1-hour ozone standard. As an automatic consequence, the DFW area must
7 be reclassified by operation of law to a higher classification. 42 U.S.C. § 7511(b)(2). Plaintiffs
8 also seek to compel the Administrator to take final action on two mandatory state
9 implementation plan (SIP) revisions for the DFW nonattainment area. The Act requires prompt
10 EPA action approving or disapproving SIP submittals from states. 42 U.S.C. § 7410(k)(2).
11 The state of Texas submitted two SIP revisions addressing the 1-hour ozone standard to EPA
12 on October 25, 1999 and April 25, 2000. EPA found these two SIP submittals “complete” on
13 December 16, 1999 and June 23, 2000, 66 Fed. Reg. 4767 (Jan. 18, 2001), starting a 12 month
14 clock for final EPA action. To date, the Administrator has not taken final action on either of
15 these DFW SIPs. The Administrator has ignored his non-discretionary duty under the CAA to
16 act upon a submitted SIP no later than 12 months after EPA determines completeness, or for
17 the DFW area, by December 16, 2000 for the “Rate of Progress” SIP and by June 23, 2001 for
18 the “attainment demonstration” SIP. See 42 U.S.C. § 7410(k)(2) and 66 Fed. Reg. 4767, *supra*.
19 Defendants’ failure to comply with their non-discretionary mandatory duties has deprived the
20 people of Texas, including Plaintiffs and their members, of clean and healthy air.
21
22
23

24 PARTIES

25 5. Plaintiff BLUE SKIES ALLIANCE, a Texas non-profit corporation with
26 principal offices in Dallas County, is dedicated to protecting and enhancing Texas’ air quality.
27
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1 BLUE SKIES ALLIANCE is working to promote public health and welfare by achieving clean
2 air in the DFW region and elsewhere.

3 6. BLUE SKIES ALLIANCE has members, supporters and directors who live,
4 work, and recreate in the Dallas-Fort Worth region and throughout the state of Texas. BLUE
5 SKIES ALLIANCE's members, supporters and directors are adversely affected by having to
6 breathe unhealthful air. BLUE SKIES ALLIANCE's members, supporters and directors, and
7 their children, experience asthma and/or other respiratory ailments whose severity is
8 exacerbated during periods of excessive air pollution. BLUE SKIES ALLIANCE's members,
9 supporters and directors, and their children alter their daily routines during periods of excessive
10 air pollution, including reduced physical exercise and recreation, additional and prolonged
11 periods of time indoors, and increased frequency of school absenteeism and missed work days
12 for individuals that are themselves injured or who care for other persons that are injured by the
13 excessive air pollution.
14
15

16 7. Defendants' failure to take timely final action determining whether the DFW
17 area attained the one hour ozone standard in 1999 interfered with the Act's program of: a)
18 promptly reclassifying areas that fail to meet attainment milestones; and b) mandating the
19 submittal of more rigorous enhanced SIPs within 12 months of the finding of failure to attain.
20 As a result, Plaintiffs, and their members, supporters and directors, have been exposed to
21 prolonged and/or repeated and unnecessary periods of unhealthful air quality. In addition,
22 EPA's failure to timely act on the 2000 DFW SIP submittal jeopardizes the iterative and on-
23 going SIP planning and revision process that is necessary to accomplish meaningful air quality
24 improvement and attainment as expeditiously as practicable. Therefore, the above-described
25 health, recreational, and economic interests of BLUE SKIES ALLIANCE and their respective
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1 members, supporters and directors have been and will continue to be adversely affected and
2 irreparably injured by the Administrator's delay in compliance with the CAA.

3 8. Plaintiff DOWNWINDERS AT RISK, a Texas non-profit corporation with
4 principal offices in Dallas County, is dedicated to protecting and enhancing Texas' air quality.
5 DOWNWINDERS AT RISK is working to promote public health and welfare by achieving
6 clean air in the DFW region and elsewhere.
7

8 9. DOWNWINDERS AT RISK has members, supporters and directors who live,
9 work, and recreate in the Dallas-Fort Worth region and throughout the state of Texas.
10 DOWNWINDERS AT RISK's members, supporters and directors are adversely affected by
11 having to breathe unhealthful air. DOWNWINDERS AT RISK's members, supporters and
12 directors, and their children, experience asthma and/or other respiratory ailments whose
13 severity is exacerbated during periods of excessive air pollution. DOWNWINDERS AT
14 RISK's members, supporters and directors, and their children alter their daily routines during
15 periods of excessive air pollution, including reduced physical exercise and recreation,
16 additional and prolonged periods of time indoors, and increased frequency of school
17 absenteeism and missed work days for individuals that are themselves injured or who care for
18 other persons that are injured by the excessive air pollution.
19

20 10. Defendants' failure to take timely final action determining whether the DFW
21 area attained the one hour ozone standard in 1999 interfered with the Act's program of: a)
22 promptly reclassifying areas that fail to meet attainment milestones; and b) mandating the
23 submittal of more rigorous enhanced SIPs within 12 months of the finding of failure to attain.
24 As a result, Plaintiffs, and their members, supporters and directors, have been exposed to
25 prolonged and/or repeated and unnecessary periods of unhealthful air quality. In addition,
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1 EPA's failure to timely act on the 2000 DFW SIP submittal jeopardizes the iterative and on-
2 going SIP planning and revision process that is necessary to accomplish meaningful air quality
3 improvement and attainment as expeditiously as practicable. Therefore, the above-described
4 health, recreational, and economic interests of DOWNWINDERS AT RISK and their
5 respective members, supporters and directors have been and will continue to be adversely
6 affected and irreparably injured by the Administrator's delay in compliance with the CAA.
7

8 11. Plaintiff PUBLIC CITIZEN, non-profit corporation incorporated in Washington
9 D.C. and with offices in Austin, Texas, with approximately 160,000 members nationwide, is
10 dedicated to protecting and enhancing Texas' air quality. PUBLIC CITIZEN is working to
11 promote public health and welfare by achieving clean air in the DFW region and elsewhere.
12

13 12. PUBLIC CITIZEN has members who live, work, and recreate in the Dallas-Fort
14 Worth region and throughout the state of Texas. PUBLIC CITIZEN's members are adversely
15 affected by having to breathe unhealthful air. PUBLIC CITIZEN's members, and their
16 children, experience asthma and/or other respiratory ailments whose severity is exacerbated
17 during periods of excessive air pollution. PUBLIC CITIZEN's Texas members, and their
18 children alter their daily routines during periods of excessive air pollution, such as engaging in
19 reduced physical exercise and recreation, spending additional and prolonged periods of time
20 indoors, and observing increased frequency of school absenteeism and missed work days for
21 individuals that are themselves injured or who care for other persons that are injured by the
22 excessive air pollution.
23

24 13. Defendants' failure to take timely final action determining whether the DFW
25 area attained the one hour ozone standard in 1999 interfered with the Act's program of: a)
26 promptly reclassifying areas that fail to meet attainment milestones; and b) mandating the
27
28

1 submittal of more rigorous enhanced SIPs within 12 months of the finding of failure to attain.
2 As a result, Plaintiffs, and their members, supporters and directors, have been exposed to
3 prolonged and/or repeated and unnecessary periods of unhealthful air quality. In addition,
4 EPA's failure to timely act on the 2000 DFW SIP submittal jeopardizes the iterative and on-
5 going SIP planning and revision process that is necessary to accomplish meaningful air quality
6 improvement and attainment as expeditiously as practicable. Therefore, the above-described
7 health, recreational, and economic interests of PUBLIC CITIZEN and their respective members
8 have been and will continue to be adversely affected and irreparably injured by the
9 Administrator's delay in compliance with the CAA.
10

11 14. Plaintiff SIERRA CLUB, a public benefit, non-profit corporation incorporated
12 in California and with offices in Austin, Texas, is dedicated to protecting and enhancing Texas'
13 air quality. SIERRA CLUB is working to promote public health and welfare by achieving
14 clean air in the DFW region and elsewhere.
15

16 15. SIERRA CLUB has members, supporters and directors who live, work, and
17 recreate in the Dallas-Fort Worth region and throughout the state of Texas. SIERRA CLUB's
18 members, supporters and directors are adversely affected by having to breathe unhealthful air.
19 SIERRA CLUB's members, supporters and directors, and their children, experience asthma
20 and/or other respiratory ailments whose severity is exacerbated during periods of excessive air
21 pollution. SIERRA CLUB's members, supporters and directors, and their children alter their
22 daily routines during periods of excessive air pollution, such as reduced physical exercise and
23 recreation, additional and prolonged periods of time indoors, and increased frequency of school
24 absenteeism and missed work days for individuals that are themselves injured or who care for
25 other persons that are injured by the excessive air pollution. SIERRA CLUB conducts various
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1 outdoor activities and programs for their members and members of the public that cause
2 increased exposure, and thus increased physical harm, during periods of excessive air pollution.
3 SIERRA CLUB conducts outdoor experience programs for children from urban areas
4 throughout the Country, including Dallas-Fort Worth. Children are generally more susceptible
5 to injury from exposure to air pollution, and the children that participate in Plaintiff SIERRA
6 CLUB's outdoor programs are particularly harmed by excessive air pollution in the DFW
7 nonattainment area and, as a result of unhealthful air pollution from Defendants' inaction, are
8 unable to fully enjoy the outdoor experience and gain a complete appreciation for nature and
9 the outdoor world.
10

11 16. Defendants' failure to take timely final action determining whether the DFW
12 area attained the one hour ozone standard in 1999 interfered with the Act's program of: a)
13 promptly reclassifying areas that fail to meet attainment milestones; and b) mandating the
14 submittal of more rigorous enhanced SIPs within 12 months of the finding of failure to attain.
15 As a result, Plaintiffs, and their members, supporters and directors, have been exposed to
16 prolonged and/or repeated and unnecessary periods of unhealthful air quality. In addition,
17 EPA's failure to timely act on the 2000 DFW SIP submittal jeopardizes the iterative and on-
18 going SIP planning and revision process that is necessary to accomplish meaningful air quality
19 improvement and attainment as expeditiously as practicable. Therefore, the above-described
20 health, recreational, and economic interests of SIERRA CLUB and their respective members,
21 supporters and directors have been and will continue to be adversely affected and irreparably
22 injured by the Administrator's delay in compliance with the CAA.
23
24

25 17. Defendant RICHARD E. GREENE is sued in his official capacity as Regional
26 Administrator, Environmental Protection Agency (EPA), Region VI.
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18. Defendant MICHAEL O. LEAVITT is sued in his official capacity as EPA Administrator and as the person with ultimate authority over EPA's findings concerning attainment and the adequacy of Texas' implementation plan.

19. Defendant ENVIRONMENTAL PROTECTION AGENCY is the federal agency responsible for carrying out various mandates under the Clean Air Act. EPA has been assigned the responsibility to take timely final action on nonattainment areas' attainment status and on air quality plans submitted by local and state authorities. EPA has enforcement duties in the event that local and state authorities fail to submit plans adequate to attain the national ambient air quality standards and otherwise conform with the Act. 42 U.S.C. § 7410.

20. The Administrator's failure to timely perform the nondiscretionary duties complained of herein illegally delays adoption of measures required by the Act to reduce ozone pollution in the DFW nonattainment area, adversely affects plaintiffs and deprives them of the health, welfare and procedural protections guaranteed to them under the Act. The relief sought herein would redress these injuries.

CLEAN AIR ACT

21. In 1970, Congress enacted the CAA to abate air pollution, enhance air quality, and to protect public health and welfare. 42 U.S.C. § 7401(b). Congress directed EPA to clean up our nation's air quality and required EPA to identify those air pollutants which endanger public health and welfare. 42 U.S.C. § 7408(a). National ambient air quality standards (NAAQS) were developed through EPA's regulatory process to establish healthful levels of the air pollutants. 42 U.S.C. § 7409(a). Exposure to ozone for a one hour period at or above the one hour ozone NAAQS causes adverse health impacts to most individuals. Some persons, denoted as members of “sensitive populations” suffer adverse health effects from one hour

1 exposure to ozone concentrations below the one hour ozone NAAQS. The Act establishes a
2 comprehensive method for controlling air pollution and improving air quality. Air quality
3 improvement activities under the Act are a “partnership” between the federal EPA, state air
4 quality agencies, and local jurisdictions. In order for this partnership to function, each entity
5 must address its responsibilities in a timely manner.
6

7 22. Localities and states which exceed the NAAQS for ozone were designated by
8 EPA as nonattainment areas. 42 U.S.C. § 7502(a). Under the 1990 Amendments to the CAA,
9 each nonattainment area was subsequently classified by EPA as a “marginal,” “moderate,”
10 “serious,” “severe,” or “extreme” area based on the severity of the nonattainment problem. 42
11 U.S.C. § 7511(a)(1).
12

13 23. To achieve the NAAQS, each state is responsible for adopting and submitting to
14 EPA a SIP designed to provide for attainment of the NAAQS in each nonattainment area “as
15 expeditiously as practicable,” and no later than a specific statutory deadline correlating to the
16 severity of the area’s air pollution problems. 42 U.S.C. § 7410(a)(1). The state prepares and
17 submits to EPA an air quality control plan containing measures needed for each nonattainment
18 area to timely attain NAAQS. Upon EPA’s approval, the regional plans become part of the
19 statewide SIP and the specific measures contained within the SIP become enforceable in
20 federal court. 42 U.S.C. § 7604(a).
21

22 24. The 1990 Amendments to the CAA responded to the states’ continued inability
23 to attain the NAAQS by revising the statutory deadlines and instituting a series of procedural
24 and substantive requirements for nonattainment areas. 42 U.S.C. § 7511(a). To assist the states
25 and local agencies achieve the ozone standard, Congress required states to prepare SIP
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1 revisions detailing how the one hour ozone standard was going to be timely achieved and
2 submit the plans to EPA. 42 U.S.C. § 7511a(a)-(e).

3 25. By November 15, 1992, all nonattainment areas had to submit an inventory of
4 actual emissions. 42 U.S.C. § 7511a(a)(1). For areas classified as “moderate” or worse, a new
5 inventory based on 1990 actual emissions had to be submitted by November 15, 1993. 42
6 U.S.C. § 7511a(b)(1).

7
8 26. Areas classified as “moderate” or worse had to submit to EPA a reasonable
9 further progress, also referred to as rate of progress, demonstration by November 15, 1993. 42
10 U.S.C. § 7511a(b)(1)(A). Pursuant to this provision, reasonable further progress means
11 achieving a 15% reduction from 1990 baseline ozone emissions by November 15, 1996. 42
12 U.S.C. § 7511a(b)(1)(A).

13
14 27. By November 15, 1994, SIP revisions for “serious” or worse areas had to
15 demonstrate that (1) the plan would provide for attainment of the ozone standard by the
16 applicable attainment date (attainment demonstration) and (2) the plan would achieve a 3%
17 reduction in emissions of ozone precursors for each year after November 15, 1996 until the
18 attainment date (post-1996 rate-of-progress demonstration). 42 U.S.C. § 7511a(c)(2)(A) & (B).

19 28. For “serious” or worse areas, the 1990 CAA Amendments also require that the
20 SIP revisions include an enhanced monitoring program and an enhanced inspection and
21 maintenance (I&M) program. 42 U.S.C. § 7511a(c)(1) & (3).

22
23 29. For “severe” or worse areas, the 1990 CAA Amendments also require that the
24 SIP revisions include more aggressive offset ratios for new and modified major stationary
25 sources, Transportation Control Measures to offset growth in motor vehicle emissions, and a
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1 rule imposing a per ton fee for stationary sources in areas that fail to attain the one hour
2 standard by the November 15, 2005 deadline. 42 U.S.C. § 7511a(d).

3 30. Upon a finding that a nonattainment area had failed to attain the standard by the
4 statutory deadline, the area is reclassified to a higher classification, 42 U.S.C. § 7511(b)(2).
5 The Act mandates that each reclassified area must adopt and submit a revised SIP adequate to
6 meet the SIP requirements for the new classification. 42 U.S.C. § U.S.C. § 7511a(i). The
7 revised SIP must be submitted no later than 12 months following the effective date of the
8 reclassification. 42 U.S.C. § 7509(d)(1).
9

10 31. Within sixty days but no later than six months after receipt of any SIP revision,
11 the Administrator shall make a completeness determination. 42 U.S.C. § 7410(k)(1)(B). To be
12 deemed complete, the SIP revision must satisfy certain minimum criteria establish by EPA. 40
13 C.F.R. Pt. 51, Appendix V. Alternatively, should the Administrator fail to make a
14 completeness determination within six months, the submitted SIP revision shall be deemed to
15 meet the minimum criteria for completeness by operation of law. 42 U.S.C. § 7410(k)(1)(B).
16

17 32. Once EPA makes a determination that a SIP revision is complete or when EPA
18 fails to act within six months after a SIP revision submittal, EPA shall act upon the submitted
19 plan within 12 months. 42 U.S.C. § 7410(k)(2).
20

21 33. If the Administrator finds that a SIP revision for any nonattainment area is
22 substantially inadequate, the Administrator shall require the state and local agencies to correct
23 the inadequacies. 42 U.S.C. § 7410(k)(5). If the Administrator determines or finds that the
24 state has failed to submit a complete SIP revision or correct a deficient SIP revision, or
25 disapproves a SIP revision in whole or in part, he shall impose certain sanctions, such as
26 prohibiting highway projects and/or increasing the applicable offset requirements. 42 U.S.C. §
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1 7509(b). Should the Administrator find that the state has failed to make a required SIP
2 submission or if the SIP revision does not satisfy the minimum criteria for completeness, a
3 federal implementation plan must be promulgated unless the state corrects the deficiency and
4 the Administrator approves the revised plan before 24 months has elapsed. 42 U.S.C.
5 7410(c)(1).
6

7
8 **FIRST CAUSE OF ACTION**

9 **FAILURE TO MAKE NON-DISCRETIONARY FINDINGS THAT THE DFW**
10 **NONATTAINMENT AREA FAILED TO ATTAIN BY NOVEMBER 15, 1999**

11 [42 U.S.C. §§ 7509(c)(2); 7511(b)(2)(B)]

12 34. Paragraphs 1-33 are incorporated herein by reference.
13

14 35. Each non-attainment area in the Country is assigned a date for attainment of the
15 health-based one hour ozone NAAQS by the CAA. 42 U.S.C. § 7511(a)(1). Based on the
16 then-existing levels of air pollution, the DFW region was classified as a “moderate” non-
17 attainment area in 1991. 56 Fed. Reg. 56694. The Act requires that “moderate” non-
18 attainment areas attain the one hour national ambient air quality standard for ozone no later
19 than 6 years after enactment, or by November 15, 1996. 42 U.S.C. § 7511. The DFW
20 nonattainment area failed to meet the 1996 attainment date, and was reclassified by EPA to
21 “serious” on March 20, 1998. 63 Fed. Reg. 8128. The attainment deadline for “serious” ozone
22 nonattainment areas was November 15, 1999. 42 U.S.C. § 7511 (a)(1). Texas did not timely
23 adopt and submit an attainment demonstration SIP and the DFW nonattainment area continued
24 to experience multiple violations of the one hour ozone NAAQS.
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1 36. The Act requires the Administrator to determine as expeditiously as practicable
2 after the November 15, 1999 attainment date, but not later than 6 months after that date,
3 whether each “serious” area had attained the ozone NAAQS by the attainment date. 42 U.S.C.
4 §§ 7509(c)(1); 7511(b)(2). At the time of such determination, the Administrator must publish
5 in the Federal Register notice of such determination. 42 U.S.C. §§ 7509(c)(2); 7511(b)(2)(B).
6

7 37. Any “serious” area which the Administrator finds has not attained the ozone
8 NAAQS by the attainment date must be reclassified by operation of law to a higher
9 classification. 42 U.S.C. §§ 7511(a)(1); (b)(2)(A). The Administrator must identify such
10 reclassification in the Federal Register notice.

11 38. Thus, not later than May 15, 2000, the Administrator was required to determine
12 whether the DFW nonattainment area had attained the ozone standard as of November 15, 1999,
13 and publish a Federal Register Notice containing such determination. If the determination was
14 that the DFW nonattainment area had not attained the ozone standard as of November 15, 1999,
15 then Federal Register Notice had to also identify the reclassification of the DFW nonattainment
16 area to “severe” “by operation of law.” 42 U.S.C. § 7511(b)(2)(A).
17

18 39. The requirements set forth in paragraphs 36-38 above are non-discretionary duties
19 of the Administrator under the Act.
20

21 40. The Administrator has not determined whether the DFW nonattainment area
22 attained the ozone standard by November 15, 1999.

23 41. The Administrator has not published a final Federal Register Notice containing his
24 determination of whether the DFW nonattainment area attained the ozone standard by November
25 15, 1999.
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1 42. The Administrator has not published a Federal Register Notice identifying the
2 reclassification of the DFW nonattainment area to "severe."

3 43. The DFW nonattainment area did not attain the ozone NAAQS by November 15,
4 1999, and remains in nonattainment. The state of Texas must immediately commence an
5 accelerated planning and implementation process in order for the DFW nonattainment area to meet
6 the next earliest applicable date of November 15, 2005, the attainment of which is based on three
7 prior years of air quality monitoring data. If this SIP revision process is furthered delayed, the
8 DFW nonattainment area may fail to attain the one hour national ambient air quality standard for
9 ozone by that date. In that event, the Act mandates the imposition of fees upon air pollution
10 emitted from major stationary sources above a certain baseline. 42 U.S.C. §§ 7511a(d)(3); 7511d.

11 44. For all the foregoing reasons, the Administrator is in violation of her non-
12 discretionary duties as set forth in 42 U.S.C. § 7509(c)(1) and 7511(b)(2). The Administrator's
13 violation of such non-discretionary duties is ongoing. On information and belief, plaintiffs allege
14 that such violation will continue unless enjoined by order of this court.
15

16 45. Plaintiffs and the public are suffering and will suffer irreparable harm because of
17 the Administrator's failure to timely perform his non-discretionary duties. Each day of EPA delay
18 forestalls the schedule for adoption of additional controls and other measures to protect plaintiffs
19 and the public from the serious health impacts of ozone pollution. Each day of EPA delay
20 undermines Congress' specific schedule for additional steps to meet the federal health standard for
21 ozone.
22

23 46. For all of the foregoing reasons, plaintiffs are entitled to an order of this court
24 directing the Administrator to formally and finally determine whether the DFW nonattainment
25 area attained the one hour national ambient air quality standard for ozone as of November 15,
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1 1999, to promptly publish a final Federal Register Notice containing such determination, and to
2 identify in such notice the reclassification of the DFW nonattainment area to “severe” if the
3 determination is (as it must be in light of the facts) that the DFW nonattainment area did not timely
4 attain the standard.

5
6 **SECOND CAUSE OF ACTION**

7 **FAILURE TO TAKE NON-DISCRETIONARY FINAL ACTION ON THE ADEQUACY**
8 **OF THE 1999 RATE OF PROGRESS SIP AND THE 2000 ATTAINMENT**
9 **DEMONSTRATION SIPS FOR THE DFW NONATTAINMENT AREA**

10 [42 U.S.C. § 7410(k)(2)]

11 47. Paragraphs 1-46 are incorporated herein by reference.

12 48. Following the 1998 reclassification of the DFW nonattainment area to “serious,”
13 the state of Texas began preparation of revised SIPs to meet new requirements. 66 Fed. Reg.
14 4767 (Jan. 18, 2001). “As a result of the reclassification, the state was required to submit both
15 an attainment demonstration SIP with an attainment date of November 15, 1999; and a Rate of
16 Progress SIP covering the years from November 15 1996 to November 15, 1999.” Id. The
17 SIPs that the state submitted in March 1999 were so patently inadequate that EPA deemed them
18 incomplete and began a process of imposing punitive sanctions against the state. Id. Seven
19 months later, on October 25, 1999, Texas submitted a revised Rate of Progress SIP that EPA
20 deemed complete on December 16, 1999. The revised attainment demonstration SIP was
21 submitted on April 25, 2000 and found complete on June 23, 2000, suspending some, but not
22 all of the sanctions processes. Id.

23 49. EPA is required by the Act to formally give or withhold its approval of a
24 submitted SIP no later than 12 months following EPA’s determination of SIP completeness. 42

1 U.S.C. § 7410(k)(2). Thus EPA had a non-discretionary duty to act on the DFW Rate of
2 Progress SIP no later than December 16, 2000 and to act on the DFW attainment demonstration
3 SIP no later than June 23, 2001.

4 50. On January 18, 2001 EPA proposed, *inter alia*, to approve the Rate of Progress
5 SIP and the attainment demonstration SIP for the DFW nonattainment area. 66 Fed. Reg. 4756
6 (Jan. 18, 2001).

7 51. To date, the Administrator has not taken final action to approve, disapprove, or
8 otherwise act pursuant to 42 U.S.C. § 7410(k)(2) of the CAA on the DFW nonattainment area
9 SIP revision. The Administrator has not published a final Federal Register Notice containing his
10 final action on the DFW nonattainment area SIP revision.

11 52. The requirements set forth in paragraphs 49-51 above are non-discretionary duties
12 of the Administrator under the Act.

13 53. The 2000 DFW Rate of Progress and attainment demonstration SIPs are in fact
14 inadequate to attain the ozone NAAQS by November 15, 1999, or by 2005. The state of Texas
15 must immediately commence an accelerated planning and implementation process to adopt and
16 submit revised Rate of Progress and attainment demonstration SIPs for the DFW nonattainment
17 area. If this process is further delayed, the DFW nonattainment area may fail to attain the one
18 hour national ambient air quality standard for ozone by the 2005 attainment deadline for "severe"
19 areas. In that event, the Act mandates the imposition of fees upon air pollution emitted from major
20 stationary sources above a certain baseline. 42 U.S.C. §§ 7511a(d)(3); 7511d.

21 54. For all the foregoing reasons, the Administrator is in violation of his non-
22 discretionary duties as set forth in 42 U.S.C. § 7410(k)(3). The Administrator's violation of such
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1 non-discretionary duties is ongoing. On information and belief, plaintiffs allege that such
2 violation will continue unless enjoined by order of this court.

3 55. Plaintiffs and the public are suffering and will suffer irreparable harm because of
4 the Administrator's failure to timely perform his non-discretionary duties. Each day of EPA delay
5 forestalls the schedule for adoption of additional controls to protect plaintiffs and the public from
6 the serious health impacts of ozone pollution. Each day of EPA delay undermines Congress'
7 specific schedule for additional steps to meet the federal health standard for ozone.
8

9 56. For all of the foregoing reasons, plaintiffs are entitled to an order of this court
10 directing the Administrator to immediately act upon the Rate of Progress and attainment
11 demonstration SIPs for the DFW nonattainment area, to promptly publish a final Federal Register
12 Notice containing such final action, and to identify in such notice any requirements for submittal
13 of a revised SIP for the DFW nonattainment area within 12 months that fulfils all applicable SIP
14 requirements of the Clean Air Act.
15

16
17 RELIEF REQUESTED

18 57. WHEREFORE, plaintiffs respectfully request that the Court:

19 A. Declare that the Administrator is in violation of his non-discretionary duties
20 under 42 U.S.C. §§ 7509(c) and 7511(b)(2) for the reasons set forth above;
21

22 B. Issue a preliminary and permanent injunction requiring the Administrator to,
23 within 30 days: i) make a formal, final determination of whether the DFW nonattainment area
24 attained the one hour ozone standard as of November 15, 1999; ii) publish in the Federal Register
25 final notice containing such determination; and iii) identify in such Federal Register notice the
26 reclassification of the DFW nonattainment area to "severe";
27
28

1 C. Issue a preliminary and permanent injunction requiring the Administrator to,
2 within 30 days: i) make a formal, final determination of approval or disapproval of the 1999 Rate
3 of Progress and 2000 attainment demonstration SIPs for the DFW nonattainment area; ii) publish
4 in the Federal Register final notice containing such determinations; and iii) identify in such
5 Federal Register notice any applicable further SIP revisions and submittal requirements for the
6 DFW nonattainment area;
7

8 D. Issue an order to show cause setting a hearing at the earliest possible date on
9 plaintiffs' request for a preliminary injunction, and order that the hearing on plaintiffs' request for a
10 permanent injunction be advanced and consolidated with the hearing on the preliminary
11 injunction.
12

13 E. Retain jurisdiction of this matter for purposes of enforcing and effectuating the
14 court's orders;
15

16 F. Grant plaintiffs their reasonable costs of litigation, including their attorney's and
17 expert witness fees; and,
18

19 G. Grant such further relief as the court deems just and proper.
20

21 Dated: October 1, 2004

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